Supreme Court, U.S.
MAY 21 2007
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No. 06-1562

IN THE

Supreme Court of the United States

JEFFREY R. GOLIN, ELSIE Y. GOLIN, NANCY K. GOLIN
Petitioners

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SACRAMENTO, HON. ROLAND L. CANDEE, PJ, AND HON. LOREN E. MCMASTER, PRESIDING,
Respondents

CLIFFORD B. ALLENBY, THERESA DELGADILLO, H. DEAN STILES, S. KIMBERLY BELSHÉ, ARNOLD SCHWARZENEGGER, COUNTY OF SANTA CLARA, AND SANTA CLARA COUNTY BOARD OF SUPERVISORS, JAMIE BUCKMASTER, MARY GREENWOOD, MALORIE M. STREET, JAQUI DUONG, RANDY HEY, SAN ANDREAS REGIONAL CENTER, INC., SANTI J. ROGERS, MIMI KINDERLEHRER, TUCKER LISKE, LISA WENDT, R.N., NANCY J. JOHNSON, CITY OF PALO ALTO, LORI KRATZER, EDNA MANTILLA, DBA EMBEE MANOR, ROSELILY TALLA, ANSELMO TALLA, DBA TALLA HOUSE, STANFORD HOSPITAL, INC., GEORGIANNA LAMB, MARVIN P. MASADA, M.D., AND DOES 1-50,
Real Parties in Interest

On Petition for a Writ of Certiorari
To the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To what extent, if any, may *defendants* in a state civil tort suit for damages have standing to object to *plaintiffs'* ex parte application for appointment of *guardian ad litem* for their incompetent child?

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PETITION FOR A WRIT OF CERTIORARI

Jeffrey R. Golin and Elsie Y. Golin, parents, next friends and lifelong caregivers of Nancy K. Golin, respectfully petition this Court for a writ of certiorari to review the denial of their petition for review of the California Supreme Court, which petition sought review of interlocutory decisions of standing in their civil lawsuit for damages in respondent Sacramento County Superior Court, now succeeded by Santa Clara County Superior Court.

CITATION OF OPINIONS AND ORDERS

None of the opinions below are reported. The following orders are included in Appendix A:

April 23, 2007. Order Granting Defendants Ex Parte Application to again remove Elsie Golin as Guardian Ad Litem (w/o prejudice), Civil, Santa Clara County Superior Court Case No. 1-07-CV-082823, Hon. Kevin Murphy, pres. (*infra*, a-3)

April 10, 2007. Application and Order for Appointment of Guardian Ad Litem – Civil, Santa Clara County Superior Court Case No. 1-07-CV-082823, transferred from Sacramento County Superior Court, Hon. Eugene Hyman pres. Elsie Golin reappointed as GAL in Santa Clara County. (*infra*, a-5)

January 2, 2007. California Supreme Court, Denial of Petition for Review of Denial of Writ of Mandate, Case No. S148450, (without comment) (*infra*, a-9)

November 20, 2006, California Third District Court of Appeal, Denial of Petition for Writ of Mandate, Prohibition and Stay, (without comment), Case No. C054107 (*infra*, a-10)

November 2, 2006, California Superior Court, County of Sacramento, order and memorandum annulling appointment of Elsie Y. Golin, mother, (without prejudice) as *guardian ad litem* for Nancy Golin, Case No. 06AS01743, Hon. Loren E. McMaster pres. (*infra*, a-11)

September 15, 2006. California Superior Court, County of Sacramento, order and memorandum rejecting ex parte motion by County of Santa Clara to remove Elsie Golin as Guardian Ad Litem on emergency basis, requiring parties to file noticed motion instead, Case No. 06AS01743, Hon. Loren E. McMaster pres. (*infra*, a-13).

August 18, 2006, California Superior Court, County of Sacramento, ex parte order appointing Elsie Y. Golin, mother, as

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June 21, 2006, (undated), California Superior Court, County of Sacramento, ex parte order appointing Elsie Y. Golin, mother, as *guardian ad litem* for Nancy K. Golin, Case No. 06AS01743, Hon. Loren E. McMaster pres., (original signature clearly redacted with correction fluid by unknown party, no reason given, court clerks then denied order had existed or been approved for two months, now in records) (*infra*, a-18)

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BASIS FOR JURISDICTION

The California Supreme Court denied review of a Petition for Review of a Writ of Mandate on January 2, 2007 (*infra*, a3). Justice Kennedy on March 30, 2007 granted petitioners extensions to file this petition to and including April 18, 2007, and again to May 21, 2007. This petition is not sought under Rule 12.5. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(a). No other rehearing has been sought or is available from this judgment except through this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As cited in the Table of Authorities. The full citation of these provisions is lengthy and is included in Appendix B.

STATEMENT OF THE CASE

This case arises from a California state civil lawsuit for damages, constitutional violations and injunctive relief brought on April 26, 2006, by JEFFREY R. GOLIN, ELSIE Y. GOLIN and NANCY K. GOLIN against the directors of state agencies for the developmentally disabled, CLIFFORD B. ALLENBY and THERESE DELGADILLO, various of their employees and supervisors, local COUNTY OF SANTA CLARA ("CSC") governmental entities and officials, CITY OF PALO ALTO and individual police, STANFORD HOSPITAL, SAN ANDREAS REGIONAL CENTER ("SARC"), various doctors, care home providers, and other persons and Does.

A. Causes and History

For five and a half years, since November 15, 2001, the Golins have diligently pursued redress for damages resulting from negligence and official misconduct by the named state agencies and vendors, city and county defendants and others, in federal and state courts. The parents complained of civil tort, personal injury and constitutional tort claims caused by the defendants' unrestrained mistreatment of themselves and their adult disabled daughter, Nancy.

By any reasonable standard, the Golins' causes of action could be characterized as anything but "frivolous", although one district court tried.[1] Each time the state has managed to avoid scrutiny of the various claims, all of which are related to

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[1] The 17 causes of action enumerated in the current civil complaint proceeding in Santa Clara County Superior Court include: Constitutional Torts (extended to the States by the Fourteenth Amendment), 28 U.S.C. §1983, First Amendment denial of familial association and free speech, Fourth Amendment denial of freedom from personal seizure and warrantless search; Fifth Amendment denial of due process; attorney malpractice (Sixth Amendment) negligent infliction of emotional distress (Eighth Amendment): negligence and breach of fiduciary duty; fraud, forgery, personal injury, misrepresentation, obstruction of justice, common law conspiracy; breach of statutory duty (W&I codes); violation of Title II of ADA (42 U.S.C. §12132); abduction and wrongful imprisonment; slander and defamation of character; malicious prosecution; wrongful termination; chemical assault and battery; medical malpractice, violation of Cal. Elder Abuse and Dependent Adult Civil Protection Act (EADAPA) Cal. Welf. & Inst. Code §§15657-15657.5.

Nancy's relief. The defendants initially achieved this via an illegal abduction of Nancy and physical confinement of her for two years along with a campaign of vilification and malicious prosecution against her parents. After her parents were exonerated, state and local officials continued to avoid any scrutiny by getting California's Director of Developmental Services appointed as Nancy's conservator[2], resulting in a fundamentally unfair state proceeding in 2003, which in part gave rise to Golins' causes of action. To this date, defendants have successfully avoided scrutiny of their care for Nancy. They have persuaded federal courts to acquiesce to their monopoly over Nancy's legal representation.

The state vendors and agency have repeatedly challenged her parents' standing to bring actions to court, while refusing themselves to act on Nancy's behalf. In essence, protecting themselves from scrutiny and potential liability – by declaring that no adverse person or entity may represent Nancy's interests and therefore no suits against them may be heard because no one willing to pursue civil action is eligible to represent Nancy.

These self-serving obstacles did not deter the Golins from pursuing their civil claims in state court, where they refiled their pendent claims last year, in April 2006 within the statutory tolling period (28 U.S.C 1367(d)). The parents understand that the role of a *guardian ad litem* or next friend is to *protect the legal rights* of the ward, a fundamentally different role than that of a limited conservator, whose job it is to *provide for the welfare* of the ward.[3] The purpose of a *guardian ad litem* is to protect the minor's interests in the litigation. (*Briggs v. Briggs* (1958) 160 Cal.App.2d 312, 319, 325 P.2d 219; see *In re Josiah Z., supra,* 36 Cal.4th at p. 678, 31 Cal.Rptr.3d 472, 115 P.3d 1133; *In re Christina B.* (1993) 19 Cal.App.4th 1441, 1453, 23 Cal.Rptr.2d 918.)). The Golins understood that FRCP Rule 17(c) and Cal. Code of Civ. Proc. §§372, 373(c) provide for appointment of *guardians ad litem* where a general conservator refuses or is unable to act *(United States v. 30.64 Acres of*

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[2] "Limited conservatorship" of person, not estate. There is no estate.

[3] *Role of the Attorney for the Alleged Incapacitated Person*", Joan O'Sullivan, 31 Stetson L. Rev. 687, Stetson Law Review, Spring 2002

Land, More or Less, Situated in Klickitat County, State of Wash., 795 F.2d 796, 804 (9th Cir.1986)).

Thus, an abusive conservator or guardian is not immunized from wrongdoing by virtue of powers of state appointment. The parents argued the 2003 state probate opinion, even if all its errors of fact and abuses of discretion were true (and they were not), still did not contain findings that could collaterally estop and preclude their ability and interest in advocating by *guardian ad litem* to act for their daughter's *legal rights*.

The parents recognized that proactively eliminating scrutiny is a universally accepted and fundamental technique employed to avoid legal liability. They assert that in this instance, this technique has been used successfully by the opposition. The continued control of Nancy's conservatorship and representation effectively avoids all litigation concerning allegations of injuries to Nancy by denying adverse representation the standing to pursue damages.

Due to unsettled law, this strategy has succeeded. The state has claimed that their conservatorship is irreversible under the rule of *res judicata*, inapplicable here because a conservatorship order cannot constitutionally be regarded as a "final" judgment. The result has been to destroy Nancy's most fundamental and basic civil rights, leaving her a permanent prisoner of the state.

In federal court, the state actors pursued their defensive strategy of keeping the parents' claims out of court entirely, by challenging Nancy's parents' right to represent her *pro se* without an attorney. The parents were forced to proceed pro se because the parents either could not find or could not afford legal representation. The case had grown to so many causes of action and the state defendants were so formidable that a hundred or so private attorneys the parents contacted refused to take it for fear it would wipe them out financially.

The success of this strategy is the principal reason that this case has thus far failed to find jurisdiction or venue for so long, not because it lacks merit. In large part, the *pro se* parents kept running afoul of the established common law rule barring non-attorney parents standing to represent their children in

federal court.[4] This rule is based on the questionable suppositions that non-attorney third party claims were *likely* to be frivolous or unmeritorious, and that there exist sufficient resources and commercial interest available in the special education bar to provide dependable representation for meritorious cases such as this. This rule is challenged in part by *Winkelman*[5] for IDEA cases.

The District Court and Ninth Circuit dismissed the parents' claims, on Rule 12(b)(6) motion by the named defendants, without appointing anyone else *guardian ad litem*, leaving Nancy unrepresented. The federal courts refused to begin to hear the federal question claims on their merits. The result is that the defendants remain free scrutiny of their constitutional or tort liability.

B. Retention of Counsel, 2005, and Appointment of Parental Guardian Ad Litem, 2006

Then, in November 2005, the parents were able to secure their present *pro bono* counsel, New York attorney Gerard W. Wallace, who continued to represent them *pro hac vice* in California state proceedings after completing federal rounds. On that basis, in Sacramento Superior Court on August 18, 2006, Mr. Wallace applied for and was granted *ex parte* appointment of Mrs. Golin, as *guardian ad litem,* in their state civil lawsuit.

Mr. Wallace affirmed by affidavit and on the form application in support of Mrs. Golin's application for *guardian ad litem*, as required by local rule[6], that after investigating the case himself he could find no apparent conflict of interest that would bar Mrs. Golin from representing her adult disabled daughter's legal interests (*infra* a-16, item 8), and that no other friend or relative was available to act. That finding was informed by his thorough review of the case.

He fully advised the court by supporting affidavit and in the

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[4] *Johns v County of San Diego*, 114 F.3d 874 (9th Cir., 1997), *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2d Cir.1990)

[5] This is one of the issues raised in regard to the *Winkelman v. Parma School District* (No. 05-983) case in Court this quarter, there in relation to congressionally authorized non-attorney parental standing in IDEA cases, and referred to in oral argument by the Chief Justice in relation to tort suits on behalf of a handicapped minor.

[6] Sac. Sup. Ct. L.R. 10.00(B), (A).

form application that Nancy was an incompetent and a "person for whom a conservator had been appointed" (*infra*, a-15, items 4b, 4c.), that this conservator was the State but that this conservator either could not or would not act, because they had a *prima facie* conflict of interest by virtue of being named as defendants (*infra* a-15, a-16, item d), being unlikely and refusing to act. Thus, Nancy required the appointment of a *guardian ad litem* for the purposes of this lawsuit, "because the person named...has a cause or causes of action on which suit should be brought", (*infra* a-15, item 5a). The judicial counsel application form clearly provides for a selection for ex parte appointment (*infra* a-14) and selection by the court on the order (*infra* a-17), without notice to opposing parties or requirement of providing proofs of service to anyone. The Sacramento Superior Court, Hon. Michael P. Kenny, granted the application of Mrs. Golin as guardian ad litem for Nancy Golin without delay on August 18, 2006 (*infra* a-14).

Thus, Nancy's claims could finally go forward, in principle. She finally had an attorney and a *guardian ad litem*.

C. Objection and Removal of Parental Guardian Ad Litem by State

The state was not notified in advance of Mrs. Golin's application, because for good reason *ex parte* applications for *guardian ad litem* are usually brought without notice to the opposing parties, and little exercise of discretion is usually involved.[7] When the defendants were served, and notified of the appointment, CSC representatives immediately objected and three times sought Mrs. Golin's removal by emergency *ex parte* motion, and request for judicial notice of the 2003 probate court decision to appoint the state rather than the parents as Nancy's "limited" conservator. CSC, despite well-settled authority to the contrary,[8] announced that they and the other de-

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[7]"appointment is usually made on application only and involves little exercise of discretion", *In re Marriage of Caballero* (App. 2 Dist. 1994) 33 Cal.Rptr.2d 46, 27 Cal.App.4th 1139, Cal.App. 2 Dist.,1993, *J.W. v. Superior Court*, 17 Cal.App.4th 958, 22 Cal.Rptr.2d 527.

[8]"As is true for appointments for minors, the appointment may properly be made on an ex parte application", *Sarracino v. Superior Court*, 13 Cal.3d 1, 12, 118 Cal.Rptr. 21, 29, 529 P.2d 53, 61 (1974); see *Granger v. Sherriff*, 133 Cal. 416, 418, 65 P. 873, 874 (1901) (not necessary that prior notice of application

(cont'd next page)

fendants were entitled to notice and an opportunity to appear to object prior to Mrs. Golin's appointment, making her appointment supposedly improper and subject to revocation on that mistaken procedural ground.

CSC claimed that Mrs. Golin's appointment was based on "misinformation", because Mr. Wallace allegedly did not inform the court that Nancy already had a conservator, a claim that is clearly unsupported by the record as was just detailed (*infra* 6). The defendants invoked no authority for their assertion, nor could one be found. CSC even pleaded that Mrs. Golin's appointment was *unnecessary* because *they* – the *defendants* – stood ready and able to represent Nancy – a *plaintiff* – themselves. CSC did not move to appoint an alternative *guardian ad litem*, but only to remove Mrs. Golin. Their early motions failed, because no emergency justifying *ex parte* relief required by court rules was demonstrated[9] (*infra* a-13).

CSC declined meanwhile to avail themselves of the regularly noticed motion procedure wherein the motion could be carefully considered with pleadings from both parties for three months.

Mrs. Golin was diligent in her duties and her discovery activities clearly upset the defendants, obtaining medical records revealing new abuse, medical neglect and malpractice in state care, that the State had adamantly refused to permit access to. Most alarming was the discovery in October 2006 of unexplained manual injuries, dental neglect resulting in destruction or loss of most of her teeth, and secret hospitalizations. Injuries which were previously unknown to the parents and which were in addition to the injuries described in prior claims.

After four months of Mrs. Golin's tenure, San Andreas Regional Center (SARC), the local state vendor assigned to act as Nancy's *de facto* conservator by the state, brought a fourth *ex parte* action for Mrs. Golin's removal to a *different* Sacramento Superior Court judge, Hon. Loren McMaster, on a 24-hour notice emergency hearing. This was held in Sacramento as an *ex parte* matter on November 2, 2006.

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be served on incompetent person or his attorney); *Briggs v. Briggs*, 160 Cal.App.2d 312, 325 P.2d 219 (2d Dist.1958) (same).

[9] California Rules of Court (CRC) Rule 379(g).

All parties were present and represented. Moving papers were not provided to the Golins or their counsel until after the hearing time, so there was no fair opportunity to reply to SARC's challenge. Nevertheless, the Golins filed an anticipatory opposition citing the damaging evidence that Mrs. Golin had already found as a result of her findings. The court reached its decision without affording a hearing (*infra*, a-11). The primary basis for SARC's justification for the necessity of granting emergency *ex parte* relief was a renewed request for judicial notice of the three-year-old probate opinion in which the state rather than the parents were appointed as their daughter's limited conservator, supported only by counsel's presumptive contention that Mrs. Golin's actions threatened in some unspecified way to jeopardize Nancy's continued custody by the state.

This justification for *ex parte* emergency relief fell far short of the necessary standard.[9] It protected the rights of the defendants, not Nancy. The Golins were not allowed the required opportunity to object to the judicial notice of this outdated, erroneous, irrelevant and disputed opinion (Cal. Evid. Code §453(a)).

Rather than merely set ground rules for her continuing appointment, respondent Judge McMaster granted SARC's ex parte motion to remove Mrs. Golin on November 2, 2006 (*infra*, a-11). He cited no specific misconduct other than the granting of the request for judicial notice of the 2003 probate decision. He "annulled" her appointment (without prejudice to reapplying in Santa Clara Superior Court) (*infra*, a-11). He invoked no authority in his opinion, but ruled that it was improper for the Golins to apply for *guardian ad litem* without notice to the interested parties (*infra*, a-11), and stated that if the application had come before him he would not have signed it[10] (*Id*).

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[10] A first application for Guardian ad Litem was made to respondent Judge McMaster on or about June 21, 2006, *was* approved and then redacted without explanation. The courtroom clerk that called the next day to inform Mr. Golin that it had been signed, then denied having said this or that the order even existed for almost two months. It was then found in records with the signature of the judge scribbled over and redacted with correction fluid, but clearly could be recognized when the correction fluid on the original was scratched off. (*infra*, a-

(cont'd next page)

No replacement *guardian ad litem* was proposed or appointed, leaving Nancy once again without representation in her lawsuit, making her again vulnerable to unrestricted and concealed neglect by her conservators.

D. Appeal of Removal by Writ of Mandate

The Golins appealed this decision to the Sacramento Third District Court of Appeal, in a Writ of Mandate (*den, infra*, a-10), which was then appealed to the California Supreme Court (*den, infra*, a-9), without comment, leaving the opinion of the lower court (*infra*, a-11) to stand.[11] The parents are now here seeking declaratory relief as to the question presented, by petition for certiorari to this Court, because there is conflict between the circuits on the application of Rule 17(c) in such cases.

E. Transfer to Santa Clara County; Ex Parte Reappointment; Ex Parte Re-Removal; Noticed Reapplication of Mrs. Golin

The case, which originated in Sacramento County, was transferred to Santa Clara County on a Cal. Code Civ. Proc. §394(b) removal motion in Sacramento Superior Court by CSC'S representatives, respondent Hon. Roland Candee, pres.

This move was opposed by plaintiffs as a second part of the Writ of Mandate on appeal here, as a move from a neutral to a non-neutral venue litigating against these powerful, entrenched and influential local defendants. It proceeded up through the Third State circuit court of appeal to the State Supreme Court, resulting in this petition for certiorari. It was received by the transferee court on March 29, 2007.

To exacerbate matters further, SARC's lawyers have now boldly filed an "anti-SLAPP" motion (Cal. Code Civ. Proc. §425.1 *et seq*) against the petitioners, alleging ironically that

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18)).

[11] Defendant San Andreas Regional Center filed an Answering Brief in the California Supreme Court petition for review, to which plaintiffs timely replied. But, strangely, the California Supreme Court issued its denial *ten minutes before* the reply was signed for and filed by the Clerk on delivery by UPS, meaning that the opposition was allowed to file an answer that was considered but the plaintiffs' reply in opposition was never read or considered by anyone, plainly a due process deprivation.

plaintiffs' lawsuit on Nancy's behalf constitutes an abridgment of SARC's first amendment rights of free speech. If this motion is successful, the plaintiffs will be forced to pay attorneys' fees, again locking them out of court if they were unable to pay.

That defendants in such a lawsuit would feel emboldened enough to attempt to file such a motion in the face of their alleged misdeeds confirms one of the plaintiffs' fears that the transfer to Santa Clara County was intended to transfer to a non-neutral venue where these entrenched and influential state and local defendants hold sway.

The parents finally secured local representation for Mrs. Golin in California on April 6, 2007, and reapplied for her appointment for *guardian ad litem* on that same day. Their attorney again applied by the normal authorized *ex parte* procedure without notice to the opposing parties, and their motion was granted routinely on April 10, 2007, by Hon. Eugene Hyman (*infra*, a-5).

As events have recently progressed, so has the boldness of the defendants' motions in the new local transferee venue, Santa Clara County Superior Court. Just as the plaintiffs feared. San Andreas Regional Center immediately applied once again *ex parte* for a 24-hour emergency order to remove Mrs. Golin a second time in Santa Clara County, on April 23, 2007. This was opposed by plaintiffs on the ground that no emergency or imminent irreparable harm was given to justify ex parte relief, yet this second ex parte dismissal was granted, Hon. Kevin Murphy, pres. (*infra*, a-3).

The defendants again argued that Mrs. Golin's access to her daughter's medical records, which would be available through normal discovery once the case proceeded, represented a risk – that they could lose custody of Nancy. The harm precipitating the emergency was not to Nancy but to the defendants. No party was proposed to replace her, leaving the post once again conveniently vacant Mrs. Golin's attorney immediately filed a scheduled *noticed* motion to be appointed GAL, or in the alternative to have neutral friend and independent volunteer visit supervisor John Lehman appointed GAL, scheduled to be heard May 30, Hon. Eugene Hyman pres.

In their opposition to the GAL motion, SARC stated that *neither Elsie Golin nor John Lehman* would be acceptable. Mr.

Lehman was viewed as unacceptable by SARC because he was on friendly terms with the Golins and thus was alleged to be "controlled" by them.

SARC admitted that a so-called "independent" GAL should be appointed. However, if the Golin's nominee for GAL is unacceptable, conversely SARC's should also be unacceptable. Should the plaintiffs' GAL be approved and controlled by *SARC*, a *defendant*? How can an "independent" and thus supposedly "neutral" party vetted by the *defendants*, be a *zealous adverse representative*? Given the past acquiescence of the Santa Clara County Courts to SARC, it would seem unlikely. What is required in a civil GAL is *adversity*, not *neutrality*.

Circuits are in disagreement on what the outcome of this situation should be. That is the question presented to this Court.

F. State opposes <u>any</u> GAL for Nancy, threatening sustaining of demurrer for lack of standing

Meanwhile, defendants SARC and CSC recently filed extensive demurrers, scheduled to be heard only five days after the disputed GAL appointment hearing, repeatedly averring as their first defense against each cause of action claimed by Nancy Golin, that *"Nancy Golin is a person for whom a conservator has been appointed and her parents do not have standing to sue on her behalf"*. If no GAL is appointed on May 30, then the CSC and SARC demurrers to be heard on June 5 could be sustained without leave to amend ending the civil litigation on Nancy's behalf forever, leaving Nancy's claims unlitigated and the defendants once again free from liability. This strategy, so successful to this date, appears likely to once again succeed.

The State defendants joined with the CSC and SARC in opposing the plaintiffs motion for appointment of Mrs. Golin as GAL, but went one step further than SARC, saying that *no party* should be appointed GAL since Nancy was not a party to the lawsuit. The reason that Nancy was not a party to the lawsuit, the State of California Attorney General explained, was that she lacked a *guardian ad litem* so she could not sue. The final defense of the state actor is that Nancy cannot sue because she does not have a GAL, and she cannot have a GAL appointed because the defendants will not appoint one. A superb example of circular reasoning, justifying an absurd result.

Thus, as of the date of this petition, May 21, 2007, Nancy Golin still lacks a *guardian ad litem* and may not proceed against these state and local officials in a civil lawsuit for damages and injunctive relief in court on her own behalf. Indeed the civil case may be lost forever by demurrers before she has a GAL to prosecute her claims.

Clearly, a Guardian ad Litem is required to protect Nancy Golin's rights in this litigation. Defendants are now conceding to the Santa Clara Superior Court, by bringing their current demurrer based in part on Nancy Golin's lack of capacity to sue and the lack of any party with standing to sue on Nancy's behalf, that they, as conservator to Nancy, will not act to preserve Nancy Golin's rights but instead will do everything in their power to deprive her of her rights by denying her a *guardian ad litem* and attempting to dispose of the case on procedural grounds.

G. Nature of the Causes of Action

This case was caused by the improper and illegal personal seizure of the Golins' adult autistic disabled daughter Nancy K. Golin ("Nancy") from her family on November 15, 2001 by police in Palo Alto, California, in violation of the Fourth Amendment, without warrant, emergency, due process or probable cause. To justify their misconduct, police filed a fraudulent report, which was quickly discredited.

Two weeks later, after the parents went to the press, police arrested and falsely charged the parents with felony abuse and neglect. The parent-petitioners bailed out immediately. They were maliciously prosecuted for 14 months after showing proofs of lack of probable cause, before their criminal charges were cleared and they were fully exonerated. Meanwhile, Nancy was conserved by the State and maintained in the same group home where she had been originally abused and injured.

The parents contend the record proves the charges against the parents were fraudulent and fabricated, designed to buy time to help the state get conservatorship of Nancy.

Nancy was severely abused, neglected, and suffered repeated injury and drugging in the residential care facilities where she was illegally placed. Her personal injuries included fractures, esophageal lesions and hernias, denial of emergency medical care, status epilepticus, neurological impairment from

drugs, dental neglect, emotional abuse, and several near-fatal emergency hospitalizations due to caregiver neglect and medical malpractice. In addition, Nancy has suffered extreme psychological distress, because she cannot understand why her loyal loving parents have rejected her (as it seems to her), and her permanence and stability have been irreparably disrupted.

Previously, the parents had no access to Nancy's medical records and could not visit her without notice, , and were thus effectively barred from advocating on her behalf. They were unable to take photos of her and to take her home with them on holidays. SARC by its discretionary actions has tried to imply there are good reasons for their abuse of discretion, but SARC has not explained what those reasons are.

REASONS FOR GRANTING THE PETITION

The plaintiffs seek review here on consideration of Supreme Court Rule 10(b), "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." This rule applies to the Supreme Court of California in denying the petition for review in *Golin v. Superior Court of Sacramento County*, Case No. S148450, of the Petition for Writ of Mandate to the State district court of appeal of the Third California District, leaving the opinion of respondent Superior Court to stand. This opinion conflicts with many circuit courts of appeal and other jurisdictions.

This case presents a question of profound importance concerning due process rights, under the Fifth Amendment of the Constitution and extended to the States by the Fourteenth Amendment. Plaintiffs can find no legal authority to provide defendants' right to notice or standing to challenge a plaintiff's ex parte choice of *guardian ad litem* in a lawsuit, as alleged by these respondents and real parties. Indeed, it is highly doubtful that such an authority, inherently violative of basic rights of due process, could ever exist.

We argue as a fundamental proposition, implicitly recognized in the past, that defendants *inherently lack standing* to pick and choose who will represent plaintiffs in a lawsuit against themselves. And this must logically extend to the plaintiff's choice of a *guardian ad litem* or next friend. Any other rule leads to this distressing result, because it may be as-

sumed that no defendant would have a natural interest in appointing a *more* effective plaintiffs' *guardian ad litem*. To permit defendant control over plaintiff's representation conflicts with fundamental fairness and basic principles of the rule of law.

This course of action by the defendants unmistakably unmasks a perverse strategy. No adverse party can represent an adverse interest. Plaintiffs allege that California is wrongfully imprisoning Nancy Golin for the purpose of thwarting any lawsuit for damages that could be filed on her behalf..

She is unable to protect herself. They have denied a protector to her. As long as a conservator has improper and unauthorized standing to approve or disapprove their opponents' choices of representatives, they can prevent the appointment of a zealous *guardian ad litem* to oppose them, and thus claim that a conservatee has no avenue for relief for their injuries or injustices whatever, and she has no rights at all. No other class of parties has such broad immunity.

We urge the Court affirm the 5th Circuit's rule in *Adelman by Adelman v. Graves*, 747 F.2d 986 (1984) agreed with by the 3rd Circuit's holding in *Gardner v. Gardner by Parson*, 874 F.2d 131 (3rd Cir., 1989), that a *guardian ad litem must be appointed* for an incapacitated adult or minor and removal not be exploited as a strategic defensive vehicle for demurrer or summary judgment - as is being done here.

Further, we argue, whatever conflicts of interest are raised in opposition, they ought to be by reason limited to the relevant conflicts alleged in the complaint, nothing more, unless they are supported by a cross-complaint. Any other conflict of interest (alleged to exist) is *irrelevant to the proceedings.*

In this case, no cross-complaint exists. Such questions must be left to the sound discretion of the trial court, whose duty it is to protect the rights of the alleged incompetent or minor and who are obligated to read a complaint as true and in a light most favorable to the plaintiff *(Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.1996)), not the defendants.

ARGUMENT I: DEFENDANTS IN A CIVIL LAWSUIT SHOULD NOT BE ENTITLED TO STANDING TO OBJECT TO PLAINTIFFS' CHOICE OF GUARDIAN AD LITEM *AS A DEFENSE.*

A. Existing Authorities

Current authorities leave ample room for discretion by parties in their selection of a *guardian ad litem*. But there is conflict on whether adverse parties may employ strategic challenges to appointments of GAL's as a vehicle to summary judgment by leaving the vacated post empty, depriving an unrepresented handicapped litigant of his rights.

A *guardian ad litem* or a next friend is often appointed to represent the interests of an individual who is incompetent and unable to represent his or her own interests in litigation. A next friend or *guardian ad litem* may include anyone who has an interest in the welfare of an individual who has a grievance or cause of action, [*Seide v Prevost* (SD NY) 536 F Supp 1121 and is essentially an officer of the court. *Kollsman v Cohen* (CA4 Va) 996 F2d 702, 25 FR Serv 3d 1208, amd (CA4 Va) slip op and costs/fees proceeding (CA4 Va) 1994 US App LEXIS 36791; *M., S. P. & P. R. Co.* (CA8 Iowa) 507 F2d 5; *Franz v Buder* (CA8 Mo) 38 F2d 605.

Cal. Code. Civ. Proc. §372(a), provides that if an incompetent person does not have a duly appointed representative, he or she may sue or defend by a next friend or by a *guardian ad litem*, see also FRCP 17(c). This language has generally been interpreted by the courts as permitting appointment of a next friend or *guardian ad litem* when it appears that the incompetent person's general representative has interests which conflict with the alleged incompetent personam.[12] Here, the interests of the general representative conflict with those of the ward, Nancy Golin, by virtue of their being named as defendants in this lawsuit.

"A *guardian ad litem* will be appointed, notwithstanding

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[12] (*Developmental Disabilities Advocacy Center, Inc. v Melton*, (CA1 NH) 689 F2d 281; *Hoffert v General Motors Corp.*, (CA5 Tex) 656 F2d 161, reh den (CA5 Tex) 660 F2d 497 and reh den (CA5 Tex) 660 F2d 497 and cert den 456 US 961, 72 L Ed 2d 485, 102 S Ct 2037; *Adelman on behalf of Adelman v Graves*, (CA5 Tex) 747 F2d 986, 40 FR Serv 2d 631)

that there is a general guardian, provided the interests of the [incompetent] require that this shall be done." *Gronfier v. Puymirol* (1862) 19 Cal. 62

A *guardian ad litem* appears in a representative capacity only; he or she does not become a party to the action, *Henderson v Briarcliff Nursing Home* (Ala) 451 So 2d 282 (*ovrl'd in part on other grounds* by *Hayes v Brookwood Hosp.* (Ala) 572 So 2d 1251); *Mayes v Sanford* (Dist Col App) 641 A2d 855, cert den (US) 130 L Ed 2d 311, 115 S Ct 356, and removal of a *guardian ad litem* does not divest the court of jurisdiction over the action or the incompetent party, *Gardner v Parson* (CA3 Del) 874 F2d 131, 13 FR Serv 3d 834; *Sarracino v Superior Court of Los Angeles County*, 13 Cal 3d 1, 118 Cal Rptr 21, 529 P2d 53; *State ex rel. Perman v District Court*, 213 Mont 130, 690 P2d 419.

B. Two Recent Cases, Williams and Kulya distinguished here

The stakes in this controversy have been raised in two new cases decided this year, one in a California district court of appeal (*Williams v. Superior Court*, 54 Cal.Rptr.3d 13 (January 27, 2007)) and the other in a federal district court (*Kulya v. San Francisco*, 2007 WL 760776 (N.D.Cal.)) (March 9, 2007)), with results inconsistent with past decisions and accepted procedure. In *State of California v. Sup. Ct.* (1978) 86 Cal. App. 3d 475, the court recognized a parent's preferential status in seeking a *guardian ad litem* appointment. Id. at 482, disapproved on other grounds in *Hernandez v. County of Los Angeles* (1986) 42 Cal. 3d 1020, 1027. Elsie Golin is Nancy's mother, and also a plaintiff in this lawsuit. However, Elsie's claims are separate and distinct from Nancy's claims, and therefore there is no conflict of interest.

This case is distinguishable from *Williams v. Sup. Ct.* where the court found a conflict precluded the father from being appointed *guardian ad litem* for his daughters in a wrongful death action where the father sought his own recovery in addition to his daughters'. Both recoveries were for damages caused by the same actions of the respondents. *Williams v. Sup. Ct.* (2007) 147 Cal.App.4th 36.

In *Williams*, the court noted that in a wrongful death

action, all survivors must be joined in one action; a survivor who declines to be named may be named as a nominal defendant. (See Code Civ. Proc., § 377.60; *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 807-808). *Id.* at 42. The father was bringing the wrongful death action on his own behalf as well as on behalf of his daughters, and had noted the potential conflict of interest in the distribution of any potential proceeds and had obtained the appointment of two well qualified family law specialists to serve as the guardians ad litem. *Id.* at 40-41. The court expressed concern that the guardians ad litem intended to charge $300.00 an hour, when the maternal grandmother was willing to serve without compensation. *Id.* at 41.

Also creating a conflict between father and daughters was the fact that the father and mother had been separated and had intended to file for dissolution. *Id.* at 40. The father's attorney told the maternal grandmother that the wrongful death award would be divided equally between father and daughters. *Id.* Finally, the San Diego County Superior Court has a local rule that precludes parents asserting individual claims or defenses from serving as *guardian ad litem* for their minor children, absent a court order to the contrary. *Id.* at 47. Notably, the Santa Clara County Superior Court has **no** similar rule.

Here, Nancy K. Golin's claims are separate and distinct from Elsie Y. Golin's claims. There is no conflict in the potential recovery, as the potential recovery for Nancy's claims are separate and distinct from Elsie's claims.

C. Challenging Guardian Ad Litem Was Misused in Kulya

In *Kulya*, a father was denied his right to represent his son as *guardian ad litem* in a civil lawsuit for damages and violations of his constitutional rights due to misconduct by police and social service agency workers, on the grounds of unsupported and apparently malicious claims that he was abusing his son by his disgruntled estranged wife with whom he was involved in a divorce and custody dispute.

The opposition objected claiming that the mere unsupported allegations that gave rise to the case created a supposed conflict of interest between the father and his son, and alleging that the father failed to properly appoint a *guardian ad litem*

before launching his suit. Citing *Williams*, the district court stated, "there is at a minimum a potential conflict of interest between [father] and [son] because of the allegations of abuse which form the ostensible basis for Defendants' subsequent conduct". The plaintiff suspected that the attorney for the police and social services agencies misused its standing to defeat a lawsuit by attempting to stop the father from representing his son's claims, as a deliberate and perverse tactical strategy. The case, however, is being allowed to proceed with the appointment of outside counsel with no connection to the father.

The issues in *Kulya* highlight what we believe is a pregnant question: What standing should a *defendant* in a lawsuit have to direct or block the course of litigation against him by picking and choosing who represents his opponent, the *plaintiff*? Is this not equivalent to allowing a defense counsel to challenge a *plaintiff's* privileged choice of counsel? Is it justified for a defendant to utilize this tactic to simply avoid a meritorious lawsuit by an aggrieved minor or incapacitated elder?

D. Kulya Raised fundamental issues of standing to object that are also present in the instant case

As *Kulya* elegantly pleaded in his brief opposing the state's motion to dismiss:[13]

> "... every attorney admitted to practice in California has a legal duty to zealously represent his clients, and avoid conflicts of interest. The duty to avoid representing plaintiffs with conflicting interests obviously does not fall upon the shoulders of defendants' counsel, nor do they have standing to complain. *It is an issue which is, simply put, not the defendants' concern*." (emph. added).

Unfortunately, we feel, the *Kulya* court disagreed with this sound reasoning and dismissed Yvan Kulya's claims citing *Williams*, requiring his father Georgiy to submit a list of alternate attorneys along with his opponents. This departs from the unbroken line of cases where a parent is appointed as a minor's *guardian ad litem* as a matter of course in the Ninth Circuit, as Kulya pointed out. The fact that there was no

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[13] 2007 WL 89076, *Kulya v. San Francisco*, 2007 WL 760776 (N.D.Cal.), plaintiffs' opposition brief.

showing of fault against the father and the complaint was most likely malicious, the presumptiveness of this decision becomes staggeringly easy to manipulate. Challenge to a plaintiff's choice of *guardian ad litem* should never be grounds for dismissal of the ward's claims, leaving him without any judicial recourse and immunizing defendants from liability for their wrongs.

Reason alone tells us that there is an inherent conflict of interest allowing a defendant to in any way make tactical decisions that direct the course of litigation, by virtue of his getting to choose who represents an injured plaintiff, or worse to get the case dismissed by objecting to his choice of representative. This deprives a plaintiff of his right to a zealous advocate of his own choice and blunts the adversarial process, tilting it in favor of the alleged wrongdoer. A defendant would not be expected to be naturally inclined to pick an attorney or *guardian ad litem* who is a *more effective* representative against his own interests. It is more likely he would seek to remove a *guardian ad litem* precisely because of his effectiveness.

The *guardian ad litem* is at all times an officer of the court and is guided by its discretion. He/She is presently required to have an attorney who is bound by ethical guidelines and is responsible to the court, although in many cases this means that an incompetent or minor's claims may be destroyed entirely if he cannot find an attorney or one is not available.

The guardian may not compromise fundamental rights, including the right to trial, without some countervailing and significant benefit.' " (*Ibid.*, accord *In re Josiah Z., supra,* 36 Cal.4th at p. 678, 31 Cal.Rptr.3d 472, 115 P.3d 1133.) Thus, when considering the appropriate *guardian ad litem* for a minor plaintiff in a civil lawsuit, the central issue is the appropriate protection of the minor's legal right to recover damages or other requested relief. In *State of California v. Superior Court* (1978) 86 Cal.App.3d 475, 150 Cal.Rptr. 308, the court recognized a parent's "preferential status" in seeking a *guardian ad litem* appointment. (*Id.* at p. 482, 150 Cal.Rptr. 308, disapproved on other grounds in *Hernandez v. County of Los Angeles* (1986) 42 Cal.3d 1020, 1027, 232 Cal.Rptr. 519, 728 P.2d 1154.)

It has long been recognized that a trial court has the responsibility to protect the rights of a minor who is a litigant in

court (see *Cole v. Superior Court* (1883) 63 Cal. 86, 89, 1883 WL 1374; *Serway v. Galentine* (1946) 75 Cal.App.2d 86, 89, 170 P.2d 32). This places an even greater restriction and supervision over the guardian's acts and protects the defendants from perceived abuses. A minor " 'is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done him. The *guardian ad litem* is appointed merely to aid and to enable the court to perform that duty of protection.' " (duPont *v. Southern Nat. Bank of Houston, Tex.* (5th Cir.1985) 771 F.2d 874, 882; see *Serway v. Galentine, supra,* 75 Cal.App.2d at p. 89, 170 P.2d 32 ["court is, in effect, the guardian of the minor and the *guardian ad litem* is but an officer and representative of the court"]. The *guardian ad litem* " is like an agent with limited powers.' (In *re Marriage of Caballero, supra,* 27 Cal.App.4th at p. 1149, 33 Cal.Rptr.2d 46.)

The rule that we oppose has the effect of depriving the most vulnerable members of our society, children, conserved elders and dependent adults, of their most zealous and naturally dedicated advocates. The better course is leave to the sound discretion of the court or jury the decision whether the minor or allegedly incompetent adult is being effectively represented and the claims have merit.

Recent cases would seem to be a dangerously overbroad expansion of the rights of defendants to thwart lawsuits objecting to their misdeeds by vilifying the plaintiffs' representative.

Denying the minor's or incompetent's right to representation by any party, a court converts an objection into a summary judgment for dismissal. By literally throwing the baby out with the bath water, minors and incompetents are left without legal protections. Courts effectively deny themselves the opportunity to exercise their fundamental duty to protect those incapable of protecting themselves.

E. Mandatory Court Approval Provides for Supervision of Settlement

An enforceable settlement of a minor's or incompetent's claim can only be consummated with court approval. [Prob.C. §§ 2504, 3500; CCP § 372; CRC 7.950 et seq.]. Minors and incompetents lack capacity to sue in their own names, and hence to settle a claim in their own names. Thus, a settlement on

their behalf must be concluded through a guardian, conservator of the estate or *guardian ad litem*. [CCP § 372]. Even if there is an existing guardianship (re minors) or conservatorship (re incompetents), the court may still appoint a *guardian ad litem* if it deems it expedient to do so. [CCP §372]. In most cases involving minors, a parent may qualify to compromise the claim, without formal appointment as *guardian ad litem*. Generally, a parent qualifies if: The claim is not against the parent; and the parents are not living separate and apart; or, if they are separated, the parent compromising the claim on behalf of the minor has care, custody and control of the minor. [Prob.C. §3500]. If the settlement is negotiated out of court, a verified petition for approval of the compromise must be filed with the probate department of the court. [CCP §372; CRC 7.950]. If the settlement is negotiated at a court settlement conference, the judge can approve the compromise at that time. But the parties will still be required to submit a formal petition for approval to the conference judge. Thus, even though the gross dollar amount of the settlement may be approved on the record in connection with the conference, the judge still must approve the remaining details when the petition is submitted (e.g., attorney fees, court costs, depository for funds, etc.). Until that time, there is no final settlement, and no dismissal of the claim will be ordered.

F. Mootness and Importance of Certiorari

Thus, even if successful, the noticed reappointment of Mrs. Golin on May 30, 2007 would not moot the question being presented here on grounds of the case or controversy issue. At any time, without settlement of this question, even if she is reappointed, defendants may proceed to object again and have her removed by some other judge on another ex parte pretext without replacement, or install their own puppet or at best an ineffective representative to continue to cover up their actions. This represents a profound denial of Nancy Golin's rights of due process, under the Fifth Amendment, extended to the States by the Fourteenth Amendment.

This fits the "*capable of repetition, yet evading review*" exception to the mootness doctrine (*Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911)).

See also, *Sosna v. Iowa*, 419 U.S. 393 (1975) defining two-part test for this exception, both of which are met in this case.

Only by granting certiorari to settle this question and afford declaratory relief can permanent relief be secured.

***G. Comparisons with* Winkelman v Parma City**

The Court is currently considering a similar question raised by *Winkelman v. Parma City*: whether the common-law rule, barring a non-attorney parent from pursuing a civil action in federal court on behalf of a disabled child, may be breached under the Individuals with Disabilities Education Act (IDEA).

While the parents in the present case now have representation for their adult disabled child, and are not pursuing a federal action for a disabled minor under IDEA, there are many congruent issues involved in both cases. Having the experience of being unfairly disqualified from representing their daughter in the past by virtue of this common law rule, and lacking counsel in the past, the Golins' invoke their past experience to declare that the rule is being overbroadly applied in many instances (and in their own case) to dismiss highly meritorious cases.

In *Winkelman*, the issue is whether a matter may move forward on behalf of an incompetent minor, when there is a dearth of available attorneys to take IDEA cases. Congress has conferred special explicit rights to such parents for IDEA cases which the court has limited itself to considering. The rule has also been breached by exceptions for parents representing their children in SSI cases. Nevertheless, outside of those exceptions, the common law rule barring non-attorney parent plaintiffs from representing their minor or disabled children appears to remain firm.

Challenges to parental representation as counsel directly compare with challenges to parental representation as *guardian ad litem*. And both rules stand or fail, based on the same reasons.

Once a parent or relative has succeeded in securing the representation of an attorney for a disabled child in a lawsuit, as the Golins have here, they may yet face a second challenge to their cause: whether courts will deem them to be "proper" *guardians ad litem* for their children, whether minors or disabled adults. They must show that there is no conflict of inter-

est between the parent and the child, and face challenges by defendants on this basis to disqualify them and thereby defeat their child's access to the courts.

This second line of defense against claims of defendants' wrongful acts has been applied inconsistently among circuits, sometimes resulting in grants of summary judgments of dismissals in otherwise highly meritorious cases. In such cases, the appropriate (if unethical) defense strategy is simply to vilify the plaintiff-parent - successfully justifying their removal. And thereby eliminating the child's causes of actions as a threat.

This rule appears to be guided by the same purpose as the common law rule against non-attorney parent petitioners: keeping the federal courts from clogging up with frivolous lawsuits by using the plaintiffs' attorney, if any, as a gatekeeper.

In each of these two legalistic gauntlets, the presumption behind the general rule is flawed. The result is that many very meritorious cases are simply not heard because of misplaced concerns. Said results include: rights of children being crushed; protections never invoked; interests of justice never served.

In the oral argument presented in *Winkelman,*[14] plaintiffs consider it to be significant that Justice Souter perceptively raised the question, "Do we have any -- any figures on the comparative numbers of frivolous cases in lawyer representation and *pro se* representation under the Act?" The response of Mr. Bergeron... "Justice Souter, we don't because most of the circuits are saying this is...we're not going to allow *pro se*". Lacking the empirical data to determine how the rule is actually being applied or misapplied, the Court is simply flying blind in its circularly reasoned assumptions that *pro se* parent-petitioner cases have presumptively frivolous cases. Assuming a truism that may have no scientific basis. The only way to obtain such data is to allow such cases to proceed (albeit on a case-by-case basis).

The attorney rule originates with the concern that non-

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[14] 2007 WL 598306 (U.S.), 75 USLW 3496, Oral Transcript of Arguments, February 27, 2007, *Winkelman v. Parma City School District*, Slip copy at p55.

attorney parents were bringing frivolous suits that have justified the view that parents could not sue on behalf of their children because they are not attorneys, as occurred in *Johns v County of San Diego*, 114 F.3d 874 (9th Cir., 1997), or in *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2d Cir.1990).

But application here expands the rule far beyond its original concerns. Our concern is not original. The Second Circuit has questioned the rule: "*[T]his rule is not as absolute as it may seem…the rule that a non-attorney may not represent her child should be applied gingerly*") *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 285 (2d Cir. July 05, 2005).[15]

The Court has received evidence, in response to Justice Kennedy, that the special education bar has limited resources and the few attorneys that handle such cases "cherry pick" them[16] (*Winkelman* transcript at 14). This is contrary to the underlying naive assumptions behind the "no attorney" rule. The reason that lawyers are *not* running to take cases is not because they judge said cases to be "losers." But because a variety of commercial reasons exists which have nothing to do with their merits. The worst cases go unfunded and unheard because the tortfeasors know how to make them too complicated by their egregious offensives for the plaintiff to afford to pursue.

The Golins' case is just such an example - a tort suit for damages, with significant claims which could not be judged as frivolous by any reasonable standard – but which costs too much to prosecute and thus -- until finding Mr. Wallace --

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[15] The *Tindall* Court reasoned: "Although the rule stems largely from our desire to protect the interests of minors, …we think it may, in some instances, undermine a child's interest …. Indeed… it may force minors out of court altogether…not allowing guardians to do so – if they are regarded by the court as reasonably competent in this regard – may thus result, in some instances, in unredressed violations of children's rights or interests", *Tindall*, 414 F.3d 281, 286

[16] Mr. Andre: "as a practical matter, there is a very limited private special ed bar and they cherry-pick only the best cases. But that doesn't mean that all the cases that are left are frivolous or meritless. There's a whole universe of cases out there, some of which may be quite strong, some of which may be on the borderline, and some which may be meritless." *Winkelman* transcript at 14.

could not find attorneys willing to risk the investment.

At least people should be freed to represent themselves and their families against massive incursions by the State if no one else is available or willing to do it.

***H. Common Question in* Winkelman *and* Golin**

The common thread in both *Golin* and *Winkelman* boils down to whether a handicapped child is *better off* without *any* effective representative to protect his legal rights and thus unable to pursue his claims in court (effectively locked out of court and deprived of all his remedies), than a handicapped child who obtains representation by a zealous natural advocate and thus may proceed and may obtain justifiable remedies. Is the former better, just because no other effective representative is available or willing to act? Or is the latter, despite the familial relationship, plainly better than no representation at all.

***I. Appointment of a Third Disinterested Party as Next Friend in Preference to Family Interferes with Stare* Decisis *by* Whitmore v. Arkansas.**

California through its vendor SARC objects to anyone that is supposedly "controlled by the Golins" to be appointed as Guardian ad Litem. Merely cooperating with the parents is grounds for the GAL's dismissal, as they see it. But plaintiffs in a lawsuit normally have to cooperate, have to be familiar with the issues and facts.[17] In *Whitmore v. Arkansas*, 489 U.S. 1073 (1989), a three pronged test was enunciated to qualify a third-party advocate: 1) there should be some reason why the person himself is unable to act on his own behalf, 2) must be truly dedicated to the interests of the party he intends to represent, and 3) have some significant relationship with that party. This test has been repeatedly affirmed by this Court and is now well settled in law.

The parents meet all three tests, and no other party is available or prepared to act as a zealous advocate, which Nancy is entitled to have. There are no other parties in this case, not even their friend Mr. Lehman, with such a significant

---

[17] An incompetent person or minor technically sues by next friend and defends by *guardian ad litem*, but the terms are normally used interchangeably.

relationship or interest at stake as the parents have with their daughter, having raised her and cared for her for 31 years, and having fought to defend her well-being and rights for the past 6 years.

The parents know this case from their firsthand personal knowledge: the truth, the lies, the injuries, the evidence, the history going back 30 years and the violations of their rights. Mr. Golin assisted in drafting the state amended complaint in *Golin v. Allenby* and verified it himself from his own direct firsthand knowledge under his attorney's guidance, including comprehensive facts that only he knows as well. For a layman he has acquired an impressive degree of useful legal knowledge in the pursuit of their daughter's redress of grievances. The parents represented themselves in the conservatorship trial and presented their evidence and cross examination themselves. They saw the violations of due process that are alleged in this complaint by these defendants. They have the time and the interest that no other parties come close to having.

If the opinion of the lower court is left to stand it would comprise a substantial interference with the Court's doctrine of *stare decisis* in *Whitmore*. To impose a so-called "neutral party" approved by her defendant/conservators on Nancy as a Guardian ad Litem for redress of her constitutional rights deprives her of her right to a zealous advocate.

> "These limitations on the 'next friend' doctrine are driven by the recognition that '[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends." *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (CA2 1921); see also *Rosenberg v. United States*, 346 U.S. 273, 291-292, 73 S.Ct. 1152, 1161-1162, 97 L.Ed. 1607 (1953) (Jackson, J., concurring with five other Justices) (discountenancing practice of granting "next friend" standing to one who was a stranger to the detained persons and their case and whose intervention was unauthorized by the prisoners' counsel). "Indeed, if there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the

jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" (*Whitmore* at 1728)

Thus to impose some third party with no previous relationship to the proposed ward or knowledge of the case runs contrary to the rule of *Whitmore*. The so-called independent third party may in fact actually be a puppet of these powerful and entrenched state *defendants*, appointed by a non-impartial court, and would violate this rule assuring plaintiff Nancy Golin the services of a zealous advocate. What is not required here is independence, but adversarial advocacy; that is our system of justice.

During the conservatorship trial, Nancy was represented by Santa Clara County public defender Malorie Street, defendant in this case charged with attorney malpractice for failing to represent her client. She sat at the same counsel table as these defendants, constantly raised motions in support of the state, filed joinder motions with the state, opposed discovery of abuse, intimidated witnesses, denied a jury and generally acted as if she was prosecuting her own client. As a result, Nancy was conserved by the State and not by her own parents, and has not been allowed to come home for 6 years or see her parents without visit conditions similar to jail visits, even though the parents have been exonerated of any claims of wrongdoing.

ARGUMENT II: THERE IS CONFUSION BETWEEN CIRCUITS AND STATE JURISDICTIONS IN THE APPOINTMENT OF GUARDIANS AD LITEM WHERE THERE IS AN ADVERSE CONSERVATOR

There is circuit conflict regarding the appointment of a next friend when the general representative has a conflict of interest with the Plaintiff. The main conflicts involve cases where a *guardian ad litem* is appointed and then removed on challenge by the opposing parties, resulting in dismissal, without anyone else being appointed, misusing challenges of guardians ad litem as a vehicle to summary judgment.

Under the Federal Rule and in some states, a minor or incompetent plaintiff sues by a next friend while a minor or incompetent defendant defends by a *guardian ad litem*, although the duties and powers of a representative in litigation are identical, regardless of which applies, *Gardner v Parson* (CA3 Del)

874 F2d 131, 13 FR Serv 3d 834; *Adelman on behalf of Adelman v Graves* (CA5 Tex) 747 F2d 986, 40 FR Serv 2d 631; *State ex rel. Schwarz v Ryan* (Mo App) 754 SW2d 949.

Additionally, it has been said that language in the Rule empowering a District Court to make such other orders as it deems proper for the protection of the incompetent person confers authority on the court to appoint a *guardian ad litem* where it is clear that the interests of the duly appointed guardian and ward conflict. (*Gardner v Parson)* (CA3 Del) 874 F2d 131, 13 FR Serv 3d 834].

The appointment of a *guardian ad litem* is largely prescribed by federal and state statutes,[18] and the requirements of representation and the circumstances of appointment vary by jurisdiction. (*Rasmussen v Fleming*, 154 Ariz 207, 741 P2d 674; *Goff v Walker* (Ky) 809 SW2d 698; *In re Fredrickson* (Minn) 388 NW2d 717; *State ex rel. Perman v District Court*, 213 Mont 130, 690 P2d 419; *In re Guardianship of Jonas*, 211 Neb 397, 318 NW2d 867; *DeSantis v Bruen* (Sup) 165 Misc 2d 291, 627 NYS2d 534; *Nelson v Ferguson*, 184 W Va 198, 399 SE2d 909.) For example, in some jurisdictions, a next friend may sue on behaif of an incompetent person in the absence of a duly appointed guardian, *Bradley v Harrelson,* (MD Ala) 151 FRD 422; *Carbonneau v Hoosier Eng'g Co.*, 96 NH 240, 73 A2d 802; *DeSantis v Bruen* (Sup) 165 Misc 2d 291, 627 NYS2d 534, or where the appointed guardian's interest conflict with the incompetent person. *In re Clark*, 212 NJ Super 408, 515 A2d 276, affd 216 NJ Super 497, 524 A2d 448.

A *sua sponte* order appointing a *guardian ad litem* for an incompetent was void in the absence of a finding that the guardian was not effectively performing her duties, or where there was no conflict of interest. *In re Estate of Dothage* (Mo App) 727 SW2d 925.

In the Third Circuit, in *Gardner v. Gardner by Parson*, 874 F.2d 131 (3rd Cir., 1989), a next friend was appointed over the general representative because the general representative was named as a defendant in the suit. The court ruled *the federal rule is not intended to be a vehicle for dismissing claims on a summary-judgment motion*. This is the rule we urge the Court

[18] FR Civ P 17(c) governs such appointments in federal litigation

to affirm.

In *Adelman by Adelman v. Graves*, 747 F.2d 986 (5th Cir., 1984) the Fifth Circuit held that a mother whose son had been appointed as conservator other than she had standing to sue the general representative (Graves) as *guardian ad litem* or at least have one appointed for her son's injuries in being wrongly imprisoned.

In *T.W. by Enk v. Brophy*, 124 F.3d 893 (7th Cir.,1997), the Seventh Circuit established ground rules favoring parents or close relatives in preference to strangers or professionals as guardians ad litem.

This Court in *Singleton v. Wulff*, 428 U.S. 106, 114-5 (1976) previously held:

> If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue... the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter."

CONCLUSION

The Court should grant the petition for writ of certiorari to settle the question presented and to afford injunctive and declaratory relief that would protect the legal interests of the conservatee, Nancy Golin, and other similarly situated persons. We urge the court to affirm the holdings of the 2nd, 3rd, 5th 7th and 9th circuits, in requiring a guardian ad litem appointment not be allowed to be vacated as a vehicle for summary judgment by defendants, and to hold that defendants have no standing to object to the appointment of a guardian ad litem for a plaintiff handicapped person that requires one.

Respectfully submitted, May 21, 2007.

s/ Gerard W. Wallace
Gerard W. Wallace, Esq.
Attorney for Petitioners

APPENDIX A

OPINIONS AND ORDERS BELOW

Page	Document
a-3	April 23, 2007. Order vacating the appointment of plaintiff Elsie Golin as Nancy Golin's Guardian Ad Litem – Santa Clara County Superior Court – Civil Div., Case No. 1-07-CV-082823 Golin v. Allenby, Hon. Kevin Murphy, pres.
a-5	April 10, 2007. Application and Order for Appointment of Guardian Ad Litem –Santa Clara County Superior Court - Civil Div., Case No. 1-07-CV-082823 Golin v. Allenby, Hon. Eugene Hyman, pres.
a-9	January 2, 2007. California Supreme Court, Denial of Petition for Review of Denial of Writ of Mandate, Case No. 148450, (without comment) (*infra*, a
a-10	November 20, 2006, California Third District Court of Appeal, Denial of Petition for Writ of Mandate, Prohibition and Stay, (without comment), Case No. C054107
a-11	November 2, 2006, California Superior Court, County of Sacramento, order and memorandum granting defendant SARC's ex parte motion annulling appointment of Elsie Y. Golin, mother, (without prejudice) as *guardian ad litem* for Nancy Golin, Case No. 06AS01743, Hon. Loren E. McMaster pres.
a-13	September 15, 2006. California Superior Court, County of Sacramento, order and memorandum rejecting defendant County of Santa Clara's ex parte motion to remove Elsie Golin as Guardian Ad Litem on emergency basis, requiring parties to file scheduled motions instead, Case No. 06AS01743, Hon. Loren E. McMaster pres.
a-14	August 18, 2006, California Superior Court, County of Sacramento, ex parte order appointing Elsie Y. Golin, mother, as *guardian ad litem* for Nancy K. Golin, Case No. 06AS01743, Hon. Michael P. Kenny, pres.
a-18	June 21, 2006, (undated, approx June 19, 2006), California Superior Court, County of Sacramento, ex parte order appointing Elsie Y. Golin, mother, as

BEST AVAILABLE COPY

Page	Document

guardian ad litem for Nancy K. Golin, Case No. 06AS01743, Hon. Loren E. McMaster pres., (original signature clearly redacted with correction fluid by unknown party, no reason given, court clerks then denied order had existed or been approved for two months, now in records).

ANN M. ASIANO, ESQ (SBN 094891)
ERIC A. GALE, ESQ. (SBN 172719)
BRADLEY, CURLEY, ASIANO, BARRABEE & CRAWFORD, P.C.
11000 Larkspur Landing Circle, Suite 200
Larkspur, CA 94939
Telephone: (415) 464-8888
Facsimile: (415) 464-8887
Attorneys Specially Appearing for Defendant,
SAN ANDREAS REGIONAL CENTER, INC.

ENDORSED
2507APR 23 A [illegible]32
D. wendof(?)
(unintelligible file stamp)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA –
UNLIMITED JURISDICTION

JEFFREY R. GOLIN, ELSIE Y. GOLIN, NANCY K. GOLIN, *Plaintiffs,* vs. CLIFFORD B. ALLENBY, THERESA DELGADILLO, H. DEAN STILES, S. KIMBERLY BELSHÉ, ARNOLD SCHWARZENEGGER, COUNTY OF SANTA CLARA, SANTA CLARA COUNTY BOARD OF SUPERVISORS, JAMIE BUCKMASTER, MARY GREENWOOD, MALORIE M. STREET, JACQUI DUONG, RANDY HEY, SAN ANDREAS REGIONAL CENTER, INC., SANTI J. ROGERS, MIMI KINDERLEHRER, TUCKER LISKE, LISA WENDT, R.N., NANCY J. JOHNSON, CITY OF PALO ALTO, LORI KRATZER, EDNA MANTILLA, ROSELILY TALLA, ANSELMO TALLA, STANFORD HOSPITAL, INC., GEORGIANNA LAMB, MARVIN MASADA, M.D.,and DOES 1-50. *Defendants*	1-07-CV-082823 ~~[PROPOSED]~~ ORDERS VACATING THE APPOINTMENT OF ELSIE Y. GOLIN AS NANCY GOLIN'S GUARDIAN AD LITEM Date: April 23, 2007 Time: 8:15 a.m. Dept.: (15)

Defendant SAN ANDREAS REGIONAL CENTER'S, Ex parte Application for an Order Vacating the Appointment of Plaintiff Elsie Golin as Nancy Golin's Guardian ad Litem was heard before this court on April 23, 2007, at 8:15 a.m. Defen-

dant San Andreas Regional Center was represented by Eric Gale, Plaintiff Jeffrey Golin appeared on his own behalf and was also represented by counsel Gerald Wallace telephonically. Plaintiff Elsie Golin was represented by counsel Lara Shapiro.

Having considered the papers on file and oral arguments pertaining thereto, and good cause appearing therefore, IT IS THEREFORE ORDERED that Defendant San Andreas Regional Center's Ex Parte Application for an Order Vacating the Appointment of Plaintiff Elsie Golin as Nancy Golin's Guardian Ad Litem is GRANTED.

The previous Order for appointment of *guardian ad litem* appointing Elsie Golin as *guardian ad litem* for Nancy Golin, dated April 10, 2007, is hereby vacated and annulled without prejudice to reapply for *guardian ad litem*, and shall have no effect. Pursuant to this order, Elsie Golin does not presently possess any *guardian ad litem* rights, and her written order dated April 10, 2007 is ineffective until ordered otherwise.

IT IS SO ORDERED

Dated April 23, 2007 s/ (Kevin J. Murphy)

JUDGE OF THE SUPERIOR COURT

CIV-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): Lara Shapiro, Esq., SBN 227194 Law Office of Lara Shapiro 2118 Greenwich Street, Suite 1 San Francisco, CA 94123 TELEPHONE NO.: 415-345-1584 FAX NO., (optional): 415-345-1584 E-MAIL ADDRESS (Optional): larashapiro@sbcglobal.net ATTORNEY FOR (Name): Elsie Golin	FOR COURT USE ONLY **FILED** 07 APR 10 AM 9:08 KIRI TORRE, CEO SUPERIOR COURT OF CA. CO. OF SANTA CLARA BY S/ (jv) DEPUTY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF: Santa Clara STREET ADDRESS: 191 NORTH FIRST STREET MAILING ADDRESS: CITY AND ZIP CODE: SAN JOSE, CA 95113 BRANCH NAME:	
PLAINTIFF/PETITIONER: Elsie Golin DEFENDANT/RESPONDENT: Clifford B. Allenby, et.al	
APPLICATION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM-CIVIL ☒ EX PARTE	CASE NUMBER 1-07-CV-082823

Note: This form is for use in civil proceedings in which a party is a minor, an incapacitated person, or a person for whom a conservator has been appointed. A party who seeks the appointment of a guardian ad litem in a family law or juvenile proceeding should use Form FJ-200. A party who seeks the appointment of a guardian ad litem in a probate proceeding should use Form DE-350, GC-100. An individual cannot act as a guardian ad litem unless he or she is represented by an attorney or is an attorney.

1. Applicant (name): Elsie Golin
   a. ☒ the parent of *(name)*: Nancy K. Golin
   b. ☐ the guardian of *(name)*:
   c. ☐ the conservator *(name)*:
   d. ☒ a party to the suit
   e. ☐ the minor to be represented *(if the minor is 14 years of age or older)*.
   f. ☐ another interested person *(specify capacity)*:
2. This application seeks the appointment of the following person as *guardian ad litem (state name, address, and telephone number)*:

Elsie Y. Golin
1350B Pacheco Blvd., #234, Los Banos, CA 93635 (408) 373-5534

3. The *guardian ad litem* is to represent the interests of the following person *(state name, address, and telephone number):*
Nancy K. Golin
858 Leith Ave., Santa Clara, CA 95954 (408) 727-0471
4. The person to be represented is:
   a. ☐ a minor *(date of birth):*
   b. ☒ an incompetent person
   c. ☒ a person for whom a conservator has been appointed.
5. The Court should appoint a *guardian ad litem* because:
   a. ☒ the person named in item 3 has a cause or causes of action on which suit should be brought *(describe)*:
   Denial of Familial Assoc. (1st and [1]4th Amend.), Unreasonable Seizure (4th and 14th Amend.), Wrongful Imprisonment, Medical Malpractice, Attorney Malpractice, Exploitation, Personal Injury, Violations of EADACPA, Negligence, Negligent and Intentional Infliction of Emotional Distress, Fraud and Conspiracy, Section 1983 Civil Rights, Breach of ADA, Obstruction of Justice,
   ☐ Continued on Attachment 5a

APPLICATION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM-CIVIL

(end of page 1 of application/order)

PLAINTIFF/PETITIONER: Elsie Golin DEFENDANT/RESPONDENT: Clifford B. Allenby, et.al	CASE NUMBER: 1-07-CV-082823

CIV-010

   b. ☐ more than 10 days have elapsed since the summons in the above-entitled matter was served on the person named in item 3, and no application for the appointment of *guardian ad litem* has been made by the person identified in item 3 or any other person.
   c. ☐ the person named in item 3 has no guardian or conservator of his or her estate.
   d. ☒ the appointment of a *guardian ad litem* is neces-

sary for the following reasons *(specify):*

The State conservator and allied parties are named defendants and thus have a prima facie conflict of interest which disqualifies them as legal representatives to protect the rights of plaintiff Nancy Golin. Nancy's mother, Elsie Golin, is the best person to protect her daughter's legal rights and prosecute Nancy's claims against the defendants.

6. The proposed *guardian ad litem*'s relationship to the person he or she will be representing is:
   a. ☒ related *(state relationship)*: Mother
   b. ☐ not related *(specify capacity):*
7. The proposed *guardian ad litem* is fully competent and qualified to understand and protect the rights of the person he or she will represent and has no interests adverse to the interests of that person. *(If there are any issues of competency or qualification or any possible adverse interests, describe and explain why the proposed guardian ad litem should nevertheless be appointed.)*

   Elsie Golin is a co-plaintiff in the suit, but her claims are separate and distinct from Nancy's claims.

Lara Shapiro — s/ (Lara Shapiro)
TYPE OR PRINT NAME — SIGNATURE OF ATTORNEY

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: April 3, '07

Elsie Golin — s/ (Elsie Golin)
TYPE OR PRINT NAME — SIGNATURE OF APPLICANT

CONSENT TO ACT AS GUARDIAN AD LITEM

I consent to the appointment as *guardian ad litem* under the above petition.

Date: April 3, '07

Elsie Golin — s/ (Elsie Golin)
TYPE OR PRINT NAME — (SIGNATURE OF PROPOSED GUARDIAN AD LITEM)

ORDER - EX PARTE

THE COURT FINDS that it is reasonable and necessary to appoint a *guardian ad litem* for the person named in item 3 of the application, as requested.

THE COURT ORDERS that *(name)*: ELSIE GOLIN

Is hereby appointed as the *guardian ad litem* for *(name)*:

NANCY GOLIN

Date: 4-9-07

s/ (EUGENE M. HYMAN)
JUDICIAL OFFICER
EUGENE M. HYMAN

☐ Signature follows last attachment

(end of page 2 of application/order)

Court of Appeal, Third Appellate District – No. C054107

S48450

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JEFFREY R. GOLIN et al., Petitioners

v.

SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent

CLIFFORD B. ALLENBY, et al., Real Parties in Interest

Application to appear pro hace vice granted
Petition for review DENIED

Corrigan, J., was absent and did not participate

SUPREME COURT
FILED
JAN 03 2007
Frederick K. Olrich
Clerk

DEPUTY

s/ GEORGE

Chief Justice

IN THE

Court of Appeal for the State of California

IN AND FOR THE
THIRD APPELLATE DISTRICT

JEFFREY R. GOLIN et al.,
Petitioners,
v.
THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondents;
CLIFFORD B. ALLENBY et al.,
Real Parties in Interest

C054107
Sacramento County
No. 06AS01743

BY THE COURT:
The petition for writ of mandate and prohibition with request for stay is denied.
Dated: November 20, 2006

s/ (Blease)
BLEASE, Acting P.J.

---

cc: See Mailing List

SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO

ORDER DETERMINING DISPOSITION OF EX PARTE APPLICATION

CASE NAME Golin v. Allenby et all		CASE NUMBER 06AS01743
TYPE OF APPLICATION APP ORD VACATING GUARD AD LIT	BY: Defendant	APPLICATION DATE 11-2-06
NAMES OF APPEARING PARTY Elsie Golin	REPRESENTING	
Gerard Wallace (atty) for elsie	telephonically	
Jeffery Golin (in pro per)		(2p. attched)

The Court having considered the above entitled ex parte application

[X] *without a hearing* [ ] *after hearing*

with appearances as noted above, rules as follows:

[X] *The application is granted.* APPT. OF ELSIE GOLIN AS G.A.L. FOR NANCY K. GOLIN ORDERED VACATED AND ANNULED W/O PREJUDICE TO REAPPLYING FOR G.A.L. STATUS IN SANTA CLARA SUPERIOR COURT

SEE ATTACHED ORDER

[ ] ~~*The application is denied on the merits of the papers presented to the Court*~~

[ ] *The application is denied without prejudice to its resubmission for the following reason(s):*

[ ] *The moving party may not proceed except by noticed motion*

[X] *Other: Counter Motion Denied w/o prejudice see attached order*

[ ] *Counsel for the _____ is ordered to prepare formal order*

NOV 2 2006 s/ (L E McMaster)

DATE JUDGE OF THE SUPERIOR COURT
LOREN E. McMASTER

(end of p.1 of order)

The Court finds that the application for Guardian ad Litem was made without notice to interested parties, such as the Department of Developmental Services, who had the authority to act as guardian of the ward, and without notice to the County of Santa Clara and the San Andreas Regional Center. The matter was acted upon by Judge Kenny who had no knowledge of the facts involved in this case.

The Court has considered the moving papers and opposition filed and evidence submitted therewith, including the declarations and the statement of decision of the Santa Clara County Superior Court in Case no. 1-02-PR 151016, In re Conservatorship of Nancy K. Golin. That statement of decision makes it clear to the Court that Jeffrey and Elsie Golin should not be appointed Guardian ad Litem. The Court takes Judicial Notice of this decision. Evidence Code section 451(d)(1); *Bach v. McNelis* (1989) 207 Cal. App. 3d 852, 865.

There is also evidence that Mr. and Mrs. Golin are exercising powers of the status of *guardian ad litem* in a manner that may be harmful to the ward and the ward's interests. There is a danger that such powers will continue to be improperly exercised to the detriment of the ward pending the transfer of this case to the County of Santa Clara, particularly since the Golins' action seeking relief from the Appellate Courts will delay the transfer to Santa Clara County.

The appointment of Jeffrey and Elsie Golin should not have been made absent notice to interested parties, including the present guardian. Had the application been presented to this judge, it would have been denied.

Therefore the order appointing Jeffrey and Elsie Golin Guardian ad Litem is ordered vacated and the order dated August 18, 2006m appointing Elsie Golin Guardian ad litem is annulled. This order is without prejudice to the Golins seeking their appointment as Guardians ad Litem in Santa Clara Superior Court.

The Counter motion of Jeffrey Golin for sanctions and other relief is denied without prejudice to the filing of a regularly noticed motion.

The Court declines to entertain oral argument on this ex parte request. There is no right to oral argument in an ex parte proceeding; the judge may properly decide the matter on the papers presented. See *Wilburn v Oakland Hospital* (1989) 213 Cal.App.3d 1107, 1111. As Local Rule 2.04 (a) states, "The adequacy of the application for temporary relief will be determined on the papers submitted."

(end of p.2 of order)

SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO

ORDER DETERMINING DISPOSITION OF EX PARTE APPLICATION

CASE NAME Golin v. Allenby		CASE NUMBER ~~06AS01743~~
TYPE OF APPLICATION OST-Motion to Vacate Order/Stay Motion	BY: Defendant	APPLICATION DATE 9/15/06
NAMES OF APPEARING PARTY Neysa Fligor	REPRESENTING County of Santa Clara	
Brenda A Ray	Governor & Stiles, @ Delgadillo	
Gerald Wallace	845-679-4410	
Jeffery Golin (in pro per)		

The Court having considered the above entitled ex parte application
☐ *without a hearing* ☐ *after hearing*
with appearances as noted above, rules as follows:
☐ *The application is granted.*
☐ *The application is denied without prejudice to its resubmission for the following reason(s):*

☐ ~~The moving party may not proceed except by noticed motion.~~

☒ Other: PARTIES TO MEET AND CONFER RE NOTICED MOTION DATE RE GAL POWERS AND TO VACATE GAL APPOINTMENT HEARD SAME DAY PRESENT MOTION FOR GAL POWERS NOT PROPERLY NOTICED FOR 9/29/06

☐ *Counsel for the _____ is ordered to prepare formal order*

SEP 15 2006 — s/ (L E McMaster)
DATE — JUDGE OF THE SUPERIOR COURT
LOREN E. McMASTER

982(a)(27)

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): Gerard W. Wallace, Esq. (N.Y. SBN 2870467) 80 New Scotland Ave. Albany, N.Y. 12208-3494 TELEPHONE NO.: (518) 445-2329 FAX NO., *(optional)*: (518) 445-2303 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Jeffrey Golin, Elsie Golin, Nancy Golin	FOR COURT USE ONLY **FILED** Bys/N.WintersDEPUTY 06 AUG 18 PM 4:57 SUPERIOR COURT OF CA. SACRAMENTO COURTS DEPT. #53
SUPERIOR COURT OF CALIFORNIA, COUNTY OF: Sacramento STREET ADDRESS: 720 Ninth St. MAILING ADDRESS: CITY AND ZIP CODE: Sacramento, CA 95814 BRANCH NAME: Civil Division Unlimited	
PLAINTIFF/PETITIONER: Jeffrey Golin, Elsie Golin, Nancy Golin DEFENDANT/RESPONDENT: Clifford B. Allenby, et.al	
APPLICATION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM-CIVIL ☒ EX PARTE	CASE NUMBER 06-AS-01743

Note: This form is for use in civil proceedings in which a party is a minor, an incapacitated person, or a person for whom a conservator has been appointed. A party who seeks the appointment of a guardian ad litem in a family law or juvenile proceeding should use Form FJ-200. A party who seeks the appointment of a guardian ad litem in a probate proceeding should use Form DE-350, GC-100. An individual cannot act as a guardian ad litem unless he or she is represented by an attorney or is an attorney.

1. Applicant (name): Jeffrey Golin
   a. ☐ the parent of *(name)*: Nancy K. Golin
   b. ☐ the guardian of *(name)*:
   c. ☐ the conservator *(name)*:
   d. ☒ a party to the suit
   e. ☐ the minor to be represented *(if the minor is 14 years of age or older)*.
   f. ☐ another interested person *(specify capacity)*:
2. This application seeks the appointment of the following person as *guardian ad litem (state name, address, and telephone number)*:

Elsie Y. Golin
1350B Pacheco Blvd., #234, Los Banos, CA 93635 (408) 373-5534

3. The *guardian ad litem* is to represent the interests of the following person *(state name, address, and telephone number):*
Nancy K. Golin
858 Leith Ave., Santa Clara, CA 95954 (408) 727-0471
4. The person to be represented is:
   a. ☐ a minor *(date of birth):*
   b. ☒ an incompetent person
   c. ☒ a person for whom a conservator has been appointed.
5. The Court should appoint a *guardian ad litem* because:

a. ☒ the person named in item 3 has a cause or causes of action on which suit should be brought *(describe)*:

Denial of Familial Assoc. (1st and [1]4th Amend.), Unreasonable Seizure (4th and 14th Amend.), Wrongful Imprisonment, Medical Malpractice, Attorney Malpractice, Exploitation, Personal Injury, Negligence, Negligent and Intentional Infliction of Emotional Distress, Fraud and Common Law Conspiracy, Section 1983 Civil Rights, Obstruction of Justice, Breach of ADA, Violations of EADACPA

☐ Continued on Attachment 5a

APPLICATION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM-CIVIL

PLAINTIFF/PETITIONER: Elsie Golin DEFENDANT/RESPONDENT: Clifford B. Allenby, et.al	CASE NUMBER: CIV-010 06-AS-01743

(end of p.1 of application/order)

b. ☐ more than 10 days have elapsed since the summons in the above-entitled matter was served on the person named in item 3, and no application for the appointment of *guardian ad litem* has been made by the person identified in item 3 or any other person.
c. ☐ the person named in item 3 has no guardian or conservator of his or her estate.
d. ☒ the appointment of a *guardian ad litem* is necessary

for the following reasons *(specify)*:

The State conservator and allied parties are named defendants and thus have a prima facie conflict of interest which disqualifies them as legal representatives to protect the rights of plaintiff Nancy Golin. Nancy's mother, Elsie Golin, is the best person to protect her daughter's legal rights and prosecute Nancy's claims against the defendants.

7. The proposed *guardian ad litem*'s relationship to the person he or she will be representing is:
   a. ☒ related *(state relationship)*: Mother
   b. ☐ not related *(specify capacity)*:
8. The proposed *guardian ad litem* is fully competent and qualified to understand and protect the rights of the person he or she will represent and has no interests adverse to the interests of that person. *(If there are any issues of competency or qualification or any possible adverse interests, describe and explain why the proposed guardian ad litem should nevertheless be appointed.)*

   No conflicts of interest whatever

Gerard Wallace, Esq. (N.Y. SBN 2870467) s/ (Gerard W. Wallace)
TYPE OR PRINT NAME SIGNATURE OF ATTORNEY

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

Jeffrey R. Golin s/ (Jeffrey R. Golin)
TYPE OR PRINT NAME SIGNATURE OF APPLICANT

CONSENT TO ACT AS GUARDIAN AD LITEM

I consent to the appointment as *guardian ad litem* under the above petition.

Date:

Elsie Golin s/ (Elsie Golin)
TYPE OR PRINT NAME (SIGNATURE OF PROPOSED GUARDIAN AD LITEM)

ORDER [■] EX PARTE

THE COURT FINDS that it is reasonable and necessary to appoint a *guardian ad litem* for the person named in item 3 of the application, as requested.

THE COURT ORDERS that *(name)*: ELSIE Y. GOLIN

Is hereby appointed as the *guardian ad litem* for *(name)*: NANCY K. GOLIN

Date: AUG 18 2006

s/ MICHAEL P. KENNY
JUDICIAL OFFICER

☐ Signature follows last attachment

APPLICATION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM-CIVIL

(end of page 2 of application/order)

982(a)(27)

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): Gerard W. Wallace, Esq. (N.Y. SBN 2870467) 35 JOHN STREET WEST HURLEY, N.Y., 12491 TELEPHONE NO.: (845) 679-4410 FAX NO., *(optional)*: E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): JEFFREY GOLING, ELSIE GOLIN, NANCY GOLIN	FOR COURT USE ONLY (File stamp obscured)
SUPERIOR COURT OF CALIFORNIA, COUNTY OF: SACRAMENTO STREET ADDRESS: 720 NINTH ST. MAILING ADDRESS: CITY AND ZIP CODE: SACRAMENTO, CA 95814 BRANCH NAME: CIVIL DIVISION UNLIMITED	
PLAINTIFF/PETITIONER: JEFFREY GOLIN, ELSIE GOLIN, NANCY GOLIN DEFENDANT/RESPONDENT: CLIFFORD B. ALLENBY, ET.AL	
APPLICATION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM-CIVIL ☐ EX PARTE	CASE NUMBER 06-AS-01743

Note: This form is for use in civil proceedings in which a party is a minor, an incapacitated person, or a person for whom a conservator has been appointed. A party who seeks the appointment of a guardian ad litem in a family law or juvenile proceeding should use Form FJ-200. A party who seeks the appointment of a guardian ad litem in a probate proceeding should use Form DE-350/GC-100. An individual cannot act as a guardian ad litem unless he or she is represented by an attorney or is an attorney.

1. Applicant (name): JEFFREY GOLIN
   a. ☐ the parent of *(name)*: NANCY K. GOLIN
   b. ☐ the guardian of *(name)*:
   c. ☐ the conservator *(name)*:
   d. ☒ a party to the suit
   e. ☐ the minor to be represented *(if the minor is 14 years of age or older)*.
   f. ☐ another interested person *(specify capacity)*:
2. This application seeks the appointment of the following

person as *guardian ad litem (state name, address, and telephone number):*
ELSIE GOLIN
1350B PACHECO BLVD., #234,
LOS BANOS, CA 93635 (650) 814-6284

3. The *guardian ad litem* is to represent the interests of the following person *(state name, address, and telephone number):*
NANCY K. GOLIN
858 LEITH AVE.,
SANTA CLARA, CA 95954 (408) 727-0471
4. The person to be represented is:
   a. ☐ a minor *(date of birth):*
   b. ☒ an incompetent person
   c. ☒ a person for whom a conservator has been appointed.
5. The Court should appoint a *guardian ad litem* because:
   a. ☒ the person named in item 3 has a cause or causes of action on which suit should be brought *(describe):*

(AS STATED IN COMPLAINT) UNREASONABLE SEIZURE (4TH AMEND.) DENIAL OF FAMILIAL ASSOC. (1ST AMEND), DUE PROCESS (5TH AMEND), FRAUD, OBSTRUCTION OF JUSTICE, CONSPIRACY, EMOTIONAL DISTRESS, BREACH OF STATUTORY DUTY, BREACH OF ADA , MEDICAL MALPRACTICE, ATTORNEY MALPRACTICE, PERSONAL INJURY, WRONGFUL IMPRISONMENT, SLANDER, MALICIOUS PROSECUTION, FAILURE OF DUTY TO CARE, WRONGFUL TERMINATION, LOST BUSINESS, ANTI-SLAP SUIT, CHEMICAL ASSAULT, EXPLOITATION,

☐ Continued on Attachment 5a

APPLICATION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM-CIVIL

(end of p.1 of application/order)

PLAINTIFF/PETITIONER: Elsie Golin DEFENDANT/RESPONDENT: Clifford B. Allenby, et.al	CASE NUMBER: CIV-010 06-AS-01743

a. more than 10 days have elapsed since the summons

in the above-entitled matter was served on the person named in item 3, and no application for the appointment of *guardian ad litem* has been made by the person identified in item 3 or any other person.

b. [ ] the person named in item 3 has no guardian or conservator of his or her estate.

c. [X] the appointment of a *guardian ad litem* is necessary for the following reasons *(specify)*:

THE CONSERVATOR AND ALLIED PARTIES ARE NAMED AS PERPETRATORS AND DEFENDANTS AND THOSE ARE DISQUALIFIED AS LEGAL REPRESENTATIVES TO PROTECT RIGHTS OF PLAINTIFF NANCY GOLIN IN THIS MATTER. ALL THREE PARTIES HAVE CAUSES OF ACTION IN THIS CIVIL LAWSUIT. SOMEONE OTHER THAN THESE DEFENDANTS IS NEEDED TO PROTECT LEGAL INTERESTS AND HUMAN RIGHTS.

8. The proposed *guardian ad litem*'s relationship to the person he or she will be representing is:
   a. [X] related *(state relationship)*: Mother
   b. [ ] not related *(specify capacity)*:

9. The proposed *guardian ad litem* is fully competent and qualified to understand and protect the rights of the person he or she will represent and has no interests adverse to the interests of that person. *(If there are any issues of competency or qualification or any possible adverse interests, describe and explain why the proposed guardian ad litem should nevertheless be appointed.)*

NO CONFLICTS OF INTEREST WHATEVER

Gerard Wallace, Esq. (N.Y. SBN 2870467) s/ (Gerard W. Wallace)
TYPE OR PRINT NAME — SIGNATURE OF ATTORNEY

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

Jeffrey R. Golin — s/ (Jeffrey R. Golin)
TYPE OR PRINT NAME — SIGNATURE OF APPLICANT

CONSENT TO ACT AS GUARDIAN AD LITEM

I consent to the appointment as *guardian ad litem* under the above petition.

Date:

Elsie Golin — s/ (Elsie Golin)
TYPE OR PRINT NAME — (SIGNATURE OF PROPOSED GUARDIAN AD LITEM)

ORDER [ ] EX PARTE

THE COURT FINDS that it is reasonable and necessary to appoint a *guardian ad litem* for the person named in item 3 of the application, as requested.

THE COURT ORDERS that *(name)*: ELSIE Y. GOLIN

Is hereby appointed as the *guardian ad litem* for *(name)*: NANCY K. GOLIN

Date: [7/18/2006]

s/ L E McMaster
(sig. concealed by correction fluid)
JUDICIAL OFFICER

[ ] Signature follows last attachment

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitutional Article VI:

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

U.S. Constitutional Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or ***abridging the freedom of speech***, or of the press; ***or the right of the people peaceably to assemble***, and ***to petition the government for a redress of grievances.***

U.S. Constitutional Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, ***against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation***, and ***particularly describing*** the place to be searched, ***and the persons*** or things ***to be seized***.

U.S. Constitutional Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor ***be deprived of life, liberty, or property, without due process of law***; nôr shall private property be taken for public use, without just compensation.

U.S. Constitutional Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to **be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.**

U.S. Constitutional Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, ***nor cruel and unusual punishments inflicted.***

U.S. Constitutional Amendment XIV:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. ***No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....***

Section 5: ***The congress shall have the power to en-***

force by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS INVOLVED

A. FEDERAL CIVIL RIGHTS STATUTES

42 U.S.C. §1983: Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. ...

42 U.S.C. §12132: Discrimination of the handicapped

Subject to the provisions of this title, ***no qualified individual with a disability shall, by reason of such disability,*** *be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity,* ***or be subjected to discrimination by any such entity.***

28 U.S.C §1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

B. CALIFORNIA CIVIL PROCEDURE CODE STATUTES

Cal. C. Civ. Proc. §372(a): Minors, incompetent persons or per-

sons for whom conservator appointed; appearance by guardian, conservator or guardian ad litem; powers; disposition of moneys recovered; waiver of juvenile law rights

California Code of Civil Procedure §372(a) *When a minor, an incompetent person, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate* ***or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case.*** *A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to appoint a guardian ad litem to represent the minor, incompetent person, or person for whom a conservator has been appointed,* ***notwithstanding that the person may have a guardian or conservator of the estate and may have appeared by the guardian or conservator of the estate.*** *The guardian or conservator of the estate or guardian ad litem so appearing for any minor, incompetent person, or person for whom a conservator has been appointed shall have power, with the approval of the court in which the action or proceeding is pending, to compromise the same, to agree to the order or judgment to be entered therein for or against the ward or conservatee, and to satisfy any judgment or order in favor of the ward or conservatee or release or discharge any claim of the ward or conservatee pursuant to that compromise. ...*

Where reference is made in this section to "incompetent person," such reference shall be deemed to include "a person for whom a conservator may be appointed."

...

California Code of Civil Procedure §373. When a *guardian ad litem* is appointed, he or she shall be appointed as follows:

...

(c) If an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding, or by the court on its own motion.

California Welfare & Institutions Code §15657. Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition

to all other remedies otherwise provided by law:

(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

(remainder of statutory citation too lengthy to reproduce here...)